United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B
P/S

75-1260

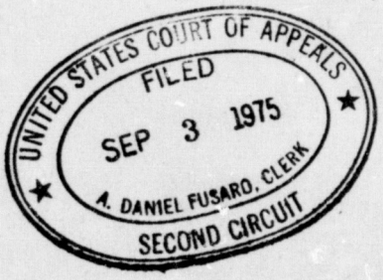
To be argued by
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- MAX MEYERS, Appellant.	Docket No. 75-1260

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether the Government failed to prove that the seventy-four year old appellant had knowingly lied when he testified before the grand jury that he did not recall two brief conversations which had occurred as much as a year previously.

2. Whether, pursuant to this Court's advisory jurisdiction, "sealing" requirements should be applied to consensual interception of communications in order to protect the integrity of evidence admitted in Federal criminal trials.

3. Whether the return of appellant's perjury indict-

ment by the same grand jurors before whom he allegedly had lied was a denial of due process.

4. Whether the grant of authority to the Strike Force attorney who presented appellant's case in the grand jury was impermissibly broad, thereby requiring reversal of appellant's conviction and dismissal of the indictment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable John M. Cannella) entered on June 30, 1975, after a trial without a jury, convicting appellant Max Meyers of two counts of perjury, in violation of 18 U.S.C. §1623. Appellant Meyers was sentenced to two months' confinement in a jail-type institution on the first count and to a one-year suspended sentence on the second, with a one-year term of probation to follow completion of his term of confinement. Appellant Meyers is currently free on his own recognizance pending appeal.

The District Court granted leave to appeal in forma pauperis and, after appellant's retained trial counsel was relieved, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Max Meyers, a seventy-four year old former clothing manufacturer (99-100, 130*), was indicted** on January 2, 1975, by a Federal grand jury in the Southern District of New York on two counts of perjury, in violation of 18 U.S.C. §1623, as a result of his testimony before the same grand jury on October 3, 1974. Appellant was tried without a jury before The Honorable John M. Cannella on February 3, 1975.

Prior to trial, appellant moved to suppress evidence derived from his conversations with a Government informant who, unbeknownst to appellant, was "wired" to record those conversations.*** The motion was denied by Judge Cannella in a written opinion dated January 29, 1975.****

Before the commencement of trial on Monday, February 3, appellant also made several oral motions. The first was a motion to dismiss the indictment based on the fact that the

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*Numerals in parentheses refer to page numbers of the transcript of the trial held on February 3, 1975.

**The indictment is "B" to appellant's separate appendix.

***Appellant's motion and memorandum are Documents #3 and #4 to the record on appeal.

****Judge Cannella's opinion is Document #9 to the record on appeal, and is "C" to appellant's separate appendix. Appellant also moved pursuant to Fed.R.Crim.P. 12(b)(2) to dismiss the indictment because of the prosecutor's failure to apprise appellant during his testimony before the grand jury of the "recantation" provisions of 18 U.S.C. §1623(d). That motion was denied in the same opinion.

same grand jury before which appellant had allegedly perjured himself was the one which returned the indictment (2-3). Counsel had learned that fact from the prosecutor only on the previous Thursday or Friday when he appeared at the prosecutor's office to hear certain tape recordings of appellant's previous conversations (2). The District Court reserved decision on the motion, giving the Government an opportunity to reply (3).*

A second oral motion by appellant was directed at suppressing tape recordings acquired by the Government as a result of consensual electronic monitoring because the Government had failed to comply with the provisions of 18 U.S.C. §2510 et seq., requiring the Government to "surrender those tapes to the judiciary for a disposition of what to do with the[m], or for the judge to order them sealed and deposited in a certain place" (4-5). In essence, while "not charging wrongdoing," appellant was "making a motion that

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*Reference was again made to this motion at the conclusion of the trial when both sides were given further time to submit papers on it if they so desired (141). While the record fails to indicate that the District Court actually decided the motion, it can be presumed that the Judge denied it since he convicted appellant on both counts of perjury and imposed judgment.

the same rule should be followed" for consensually acquired tape recordings as for non-consensually seized communications (5-6).* The District Court denied the motion with an exception to appellant (6).

A. The Trial: The Government's Case

The Government's case against appellant was premised almost entirely upon the testimony of Harold Whellan, a paid Government informant, and tape recordings of two conversations on October 4, 1973, and February 28, 1974, between

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*Appellant's trial counsel stipulated that "the FBI agents and agents of the FBI took these tapes as a result of the surveillance they conducted and that they kept them in their custody until it was produced here in court" (30). However, counsel was unwilling to stipulate to "the nexus," that is, "the tapes were not within the custody of the court, that they were originally in the custody of the United States Attorney's office and [that] office had custody completely instead of depositing [the tapes] with the court, as Congress has mandated" (30).

Moreover, counsel was willing to "accept the United States Attorney's word" that the tape recordings the Government sought to introduce into evidence (Exhibits #1 and #4) were originals of the duplicates counsel had heard in the prosecutor's office shortly before trial (32). The originals had been duplicated "under [the] authority" of Special Agent Guio and maintained with the original tapes at FBI headquarters (33). It had been disclosed at trial, however, that Agent Guio had not actually received the original tape recording of the October 4, 1973, conversation between appellant and the informant until October 9, 1973, when he was handed "a reel of magnetic recording tape" by Sergeant Gerard Panza of the New York City Police Department, who was involved in the investigation (29). A written stipulation concerning the chain of custody of the tape recordings was subsequently entered into (Document #14 to the record on appeal).

appellant and the informant which took place approximately one year and eight months, respectively, before appellant's grand jury appearance.

Between May 1973 and July 1974, the New York Organized Crime Strike Force established and conducted, with United States Government money, a fully operational coat manufacturing concern called Whellan Coat Company in Manhattan (17-28, 37). The company was created for the purpose of investigating, among other things, extortionate credit transactions, illegal pay-offs to union officials, and illegal influence over the selection and use of trucking services in the "garment district" of New York (28). The company employed Michael Guio, a special agent of the Federal Bureau of Investigation, and Gerald Panza, a seargeant with the New York City Police Department, in undercover capacities (26).

The president of the company was Harold Whellan, a Government informant who was paid $600 per week while the company was in operation, $2,500 when it closed, and $880 per month afterwards, along will "all the fringe benefits" (37-40). Whellan had previously been a wealthy clothing manufacturer, but "lost it all" through involvement in "gambling ... going out, women, good times" and, ultimately, "shylocks" (41, 63, 91). Indeed, Whellan had been induced to begin his role as an informant four years earlier when he was approached by FBI agents who had found his name in

"shylock" records they had seized (40, 63-64).

Whellan's father and appellant had been friends, and Whellan himself, who was fifty-three years old at the time of trial, had, from the age of fifteen or sixteen, also been friendly with appellant (64-66). While accompanying his father as "a kid," Whellan used to see appellant in restaurants in the garment district, and when Whellan went into the manufacturing business, appellant was "always friendly" to him (43, 66). After the Whellan Coat Company began its operation in May 1973, Whellan went to see appellant once or twice a week to get his advice about "either union problems I would have or a trucking firm or labor" (44).

As a result of an increase in business for the Whellan Coat Company, Whellan wanted to employ the services of a sub-contractor in Brooklyn, and thus needed a trucker who would pick up and make deliveries in Brooklyn (48). The practice in the industry required that a manufacturer be "married" or "registered" to his trucker: that is, without the permission of the trucker, a manufacturer in the garment district could not use or change to another trucker (45-46). Whellan's trucker was Amity Trucking Company, operated by Natale Evola and later by his brother, Joe Evola (48-50). Since Whellan did not believe that Amity Trucking operated in Brooklyn, he asked the attorney for Whellan Coat Company, Jack Hirsch, who was unaware of the company's under-

cover function, what trucker should be used. Hirsch told Whellan to use Trinity Trucking Company (48, 50-51). Whellan said he would "make sure ... [by] ask[ing] Max Meyers" (51). Whellan telephoned appellant to ask for an appointment to talk about the trucking problem.

The two met on October 4, 1973. Wearing a concealed tape recorder, Whellan went to see appellant, ostensibly for the purpose of asking his advice about the "trucking problem," but actually to obtain "information which would be valuable to the Government in prosecuting whatever crime there was in the area" (51, 69, 71). The meeting took place at appellant's manufacturing firm, Gold Line Fashions, located at 519 Eighth Avenue.*

During the course of the meeting, which lasted no more than twenty minutes, Whellan explained the situation to appellant and the fact that Hirsch, the attorney, had advised giving the Brooklyn route to Trinity Trucking Company (52). Appellant responded:

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*Appellant's firm, Gold Line Fashions, was involved in liquidation proceedings at that time, and the informant himself recognized that appellant was "concerned" about the situation (51, 75-76).

> ... Your truckman is Amity and only Amity. You cannot give it ... I would like you to give it to Trinity, but your truckman is Amity and that is who you have to use unless he gives you permission.
>
> (52).*

On February 28, 1974, once again carrying a concealed recording device, Whellan went to appellant for advice concerning a "cutting problem" he was having and a fine which had been imposed on him by the union (57-58). At the end of the conversation, after appellant had given Whellan his advice on the problem, Whellan asked appellant concerning an upcoming appointment with a union official: "'Now with the appointment, do I have to take care of anybody, do I have to see anybody,' meaning gratuities, something or other" (60). Appellant responded, "You must -- these people do not make a living from the union. You have to give them a Christmas bonus every so often" (60).**

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*A partial transcript of the tape recording of the foregoing conversation on October 4, 1973, prepared by Special Agent Guio, was introduced into evidence as Government Exhibit #1-A (34), and is "D" to appellant's separate appendix. An edited version of Agent Guio's transcription was prepared by the informant, Whellan, while listening to a duplicate of the original tape recording on the Saturday before the trial commenced. Whellan's edited version was introduced into evidence as Government Exhibit #5 (53-54, 95-98).

**A transcript of the tape recording of the conversation of February 28, 1974, this time prepared by Special Agent Joseph R. Coyne, was introduced into evidence as Government Exhibit #4-A (34), and is "E" to appellant's separate appendix. The exact statement of appellant, as set forth on page 7 of that transcript, was:

> ... [I]ncidentally, I am going to say this in front of Jack [referring to Jack Hirsch,

In addition to the conversations with appellant on October 4 and February 28, Whellan, who claimed to have "a very good memory" as a result of education and intelligence, stated that he had tape recorded no more than four other conversations with appellant between those two dates (76-77, 80). However, Agent Guio found, as a result of his review of FBI files, that in addition to the October 4 tape, there were eight others (139).

On July 22, 1974, appellant was called as a witness before a Federal grand jury in the Southern District of New York which was investigating, among other things, violations of Federal laws prohibiting extortion, racketeering, and illegal payments to union officials in the garment district of New York. After invoking his Fifth Amendment privilege against self-incrimination, appellant was excused.

On October 3, 1974, almost exactly one year after appellant's conversation with Whellan concerning the "truck-

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(Footnote continued from the preceding page)

> the attorney for Whellan Coat Company, who was also present], you can do anything you want; people don't make a living from the union, you give the union a Christmas gift every once and awhile."

Whellan also prepared an edited version of Agent Coyne's transcription of this conversation on the Saturday before the commencement of the trial. Whellan's edited version was introduced as Government Exhibit #6 (61, 95-98).

ing problem," and more than seven months after his conversation with Whellan concerning the "cutting problem" and the "Christmas bonus," appellant was again called as a witness before the grand jury and testified under a grant of immunity pursuant to 18 U.S.C. §6002.* In the course of his testimony, over two hundred questions were asked of appellant, among which were several directed to the substance of the October 4 and February 28 conversations, although no dates were mentioned to appellant. Moreover, appellant described himself in the grand jury proceedings as "a little old and a little deaf," and complained of "an abscess on my tooth and I didn't sleep well all night. I have a very dull pain" (G.J. 33, 44**). Nevertheless, appellant was asked:

> Q. Did you ever have any conversations with this man Whelan [sic] about what truckers he should use?
>
> A. No, sir.
>
> * * *
>
> Q. Well, did you ever have any conversations with Mr. Whelan [sic] in which you told him that he had to use or should

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*The order granting immunity was signed by Judge Constance Baker Motley on September 27, 1974.

**Numerals in parentheses preceded by "G.J." refer to page numbers of the transcript of appellant's October 3, 1974, grand jury testimony, which were introduced into evidence at trial as Government Exhibit #7-A, and stipulated to be accurate (94). The minutes are Document #31 to the record on appeal.

use Mr. Evola's company for all his trucking?

A. No, sir.

(G.J. 55, 58).

Later, however, upon pursuing this line of questioning in a more general fashion, the following colloquy occurred:

Q. You never told any manufacturer that he was registered to a certain trucker or a certain trucker was registered to him in a sense of having to use that certain trucker in a sense that you just described?

A. I wouldn't remember that, sir. I don't keep conditions down. You asked the question. Whether I can remember, all I would say to you the phrases are around. The conditions I know. Whether I told anybody -- I don't remember that, sir. I am not in the trucking business, sir.

* * *

Q. You are saying to the best of your memory you have never told anybody that they ought to use or should use a certain trucker, is that right?

A. Yes.

(G.J. 70, 71).

Based on his testimony, appellant was indicted by the same grand jury for perjury (Count I of the indictment).*

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*The complete testimony which constituted the basis for Count I is fully set forth in the indictment, "B" to appellant's separate appendix.

Before the grand jury appellant was also asked:

> Q. Do you understand what I am asking you, I am asking you in substance did you ever tell Mr. Whelan [sic] that he should pay off any union officials?
>
> A. I understand your question. I would say offhand, I would say no.
>
> Q. I am not asking you to be offhanded about it.
>
> A. I couldn't remember specifically, because I couldn't tell him who to pay, because I don't know, no union officials to pay in the cutters' union....
>
> * * *
>
> Q. You were saying you are 99 per cent sure you never told Whelan [sic] he should ever give any kind of gifts or Christmas gifts to union officials, is that correct?
>
> A. I would even go further and say even 100. To the best of my memory is concerned. I said you are a big boy, do anything you want.
>
> Q. Well, did you ever have any conversation with Mr. Whelan [sic] about whether he should give money or gifts of any kind to any union officials, Mr. Meyers?
>
> A. I don't think he ever asked me that type of question....
>
> Q. Is the answer to my question no, you never had any?
>
> A. I would have to say no.
>
> (G.J. 56-58).

Based on his testimony, appellant was also indicted in a second count of the indictment for perjury.

At trial, a stipulation was entered into that if Anna

Haden, the deputy forelady of the grand jury, had appeared as a witness, she would have testified that a quorum of sixteen was present when appellant testified before the grand jury under oath, that she personally was present when appellant testified, that the testimony set forth in the indictment was taken before that grand jury while she was present, and that the grand jury was investigating relationships between truckers, garment makers, and unions in the garment inductry (24-25).

At the close of the Government's case, appellant moved for a judgment of acquittal under Rule 29. Notwithstanding the mandate of the rule, the court reserved decision (98).

B. The Trial: The Defense Case

The only witness for the defense was appellant Max Meyers, who was born on April 23, 1900 (99). Appellant had been in the clothing manufacturing business since 1931 or 1932, but was at present unemployed and receiving unemployment insurance, although he was looking for another job in the industry (106, 130).

Appellant explained that he had had "a lot" of conversations with Harold Whellan, who "used to come to [appellant] like a son," but that he had difficulty remembering any one of them (101, 104). Appellant explained that he did not remember the October 4, 1973, conversation with Whellan when

he testified before the grand jury a year later, and believed he was giving truthful answers to the grand jury (102-103). Moreover, he did not remember that conversation when he heard the tape recording of it just prior to trial in the prosecutor's office (102).* Finally, it was "hard for [him] to say yes and it's hard for [him] to say no" as to whether he remembered that conversation on February 3, 1975, when he testified at trial (102, 129). When he heard the tapes befor trial, however, he "thought it wasn't [his] voice" (122).

As to the February 28, 1974, conversation with Whellan, appellant stated he had not remembered it when he testified eight months later before the grand jury, and believed he was telling the truth when he testified before the grand jury that he had not advised Whellan "to give any Christmas present to anybody" (103-104, 135-136).

Appellant stated that he did not intend to lie to the grand jury, and that if he had remembered the conversations he was asked about, he would surely have testified to them:

> ... Of course I would have. I had immunity. I mean, immunity, you gave me to understand anything they give you immunity they can't prosecute. That is what you told me before I went in there.
>
> (105).

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*The prosecution had not attempted to refresh appellant's recollection of that conversation by use of the tape recordings prior to or during appellant's grand jury appearance (103).

On cross-examination, appellant testified he did remember having seen Joe Evola socially, but no more than "three or four times ... in my life," and he did not remember any specific occasion (108-109). Appellant also remembered having given $3,000 to one Andy Dillon while Dillon was in the hospital and said he needed it, and he remembered receiving $1,500 from Whellan some time before appellant testified in the grand jury (116-117, 120).

Appellant did not, however, remember his specific grand jury testimony (137). He also had difficulty remembering precisely when he had testified before the grand jury. When asked by the prosecutor whether he had testified before the grand jury "about four months ago," appellant responded:

> Judge, Your Honor, I have very little schooling and my memory is -- I am trying to answer you. If you say four months, I will go along with you. If you say four months, four months.
>
> (115).

Later, referring to his grand jury testimony and whether he remembered it, appellant said, "Specifically, that happened 10 months ago. I have no recollection whatsoever, sir" (137).

After appellant's testimony, both sides rested, and the court reserved decision in order to "read the transcript" and to permit the parties to submit papers (140). Subsequently, appellant filed a memorandum in support of his motion pursuant to Fed.R.Crim.P. Rule 29 for a judgment of acquittal, contending that the Government had not proved beyond a reason-

able doubt that appellant had willfully given false testimony before the grand jury, and that the Government had "trapped" appellant by not having refreshed his recollection by means ofthe tape recordings of the conversations appellant was asked about in the grand jury.*

In a written memorandum decision dated February 13, 1975,** the court denied appellant's motion for a judgment of acquittal, and found appellant guilty as charged. The District Judge stated, in part:

> The Government has shown to our satisfaction beyond a reasonable doubt that Meyers acted willfully and knowingly in giving false testimony to the Grand Jury and that he was possessed of an intent to lie. In this regard the Court finds Meyers' trial testimony to be inherently incredible and not worthy of belief. His assertedly poor memory is belied by the definite and certain responses which he gave to the questions put to him in the Grand Jury. (His purported inability to remember the number of months between October and February is indicative of the nature of his trial testimony.) In short, we find that Meyers knew full well that his statements to the Grand Jury were false, that he made them willfully and that he intended to lie to that body. Despite his protestations to the contrary, we find that Meyers does not now suffer (and did not then suffer) from any lapse of memory other than that which is of his own choosing.
>
> (2-3).

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*Appellant's memorandum is Document #15 to the record on appeal.

**The memorandum decision of the District Court is "F" to appellant's separate appendix.

The District Court also found that appellant had no right to have the Government disclose the existence of the tape recorded conversations to him before his grand jury testimony.

In a written motion dated March 12, 1975,* appellant moved, prior to sentence, pursuant to Fed.R.Crim.P. 6, 12, and 34, to dismiss the indictment or arrest judgment on the authority of United States v. Philip Crispino, 74 Cr. 932 (S.D.N.Y., February 13, 1975) (Werker, J.). Appellant claimed that the Special U.S. Attorney, E.M. Shaw, who presented appellant's case in the grand jury, was acting pursuant to an overly and impermissibly broad letter of authority, as was the special attorney in Crispino. In a written memorandum and order dated June 24, 1975,** the District Court denied the motion on the authority of this Court's decision in In re Persico, Doc. No. 75-2030, slip opinion 4129 (2d Cir., June 19, 1975).

On June 30, 1975, appellant appeared before Judge Cannella for sentencing. Although observing that "I don't see any reason for rehabilitation for a man of his age," the court nevertheless sentenced appellant to a two-month term

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*Appellant's motion is Document #17 to the record on appeal; respondent's answering papers are Document #20, Vol. II, to the record on appeal.

**This memorandum and order is "G" to appellant's separate appendix.

of imprisonment on Count I and to a one-year term of imprisonment on Count II, with execution of sentence suspended on that count and a one-year term of probation imposed (147, 150).

ARGUMENT

Point I

THE GOVERNMENT FAILED TO PROVE THAT THE SEVENTY-FOUR YEAR OLD APPELLANT KNOWINGLY LIED WHEN HE TESTIFIED BEFORE THE GRAND JURY THAT HE DID NOT RECALL TWO BRIEF CONVERSATIONS WHICH HAD OCCURRED AS MUCH AS A YEAR PREVIOUSLY.

The gravamen of the perjury indictment against appellant, under Count I as well as Count II, was that he had knowingly given false testimony before the grand jury on October 3, 1974, when he denied remembering portions of two conversations he had had with the government informant on October 4, 1973, and February 28, 1974. The Government, however, proved only that the conversations had occurred, rather than appellant's memory of them, and appellant's testimony at trial failed to cure this gap in the Government's case. Thus, the knowledge element of the perjury charge was not supported by sufficient evidence to prove appellant's guilt beyond a reasonable doubt, and appellant's motion for a judgment of acquittal should have been granted.* United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

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*Appellant moved at the close of the Government's case for a judgment of acquittal pursuant to Fed.R.Crim.P. 29. Despite the rule's clear requirement that "[t]he court must decide a motion made at the close of the government's case at that time, and may not reserve decision," 2 Wright, FEDERAL PRACTICE AND PROCEDURE, §462 at 245 (1969 ed.), the

A. Count Two

Turning first to Count II of the indictment, the Government chose to consider as constituting that count of appellant's alleged perjury appellant's answers to nine questions

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(Footnote continued from the preceding page)

District Court here erroneously reserved decision and counsel made no further demand for a ruling. While this Court has said on several occasions that the right to a review of the adequacy of the Government's case is waived where a defendant subsequently puts on a defense, "at least in the absence of a demand for a ruling on the motion and explicit refusal by the judge to obey the mandate of the rule" (United States v. Rosengarten, 357 F.2d 263, 266 (2d Cir. 1966); accord, United States v. Borrone-Iglar, 468 F.2d 419, 421-422 (2d Cir. 1972); United States v. Brown, 456 F.2d 293 (2d Cir.), cert. denied, 407 U.S. 910 (1972)), other Circuits have concluded that the right is not waived by putting on a defense. Cephus v. United States, 324 F.2d 393 (D.C. Cir. 1963); United States v. Guinn, 454 F.2d 29, 33 (5th Cir.), cert. denied, 407 U.S. 911 (1972); Sullivan v. United States, 414 F.2d 714, 715 (9th Cir. 1969); see also Comment, Motion For Acquittal: A Neglected Safeguard, 70 Yale L.J. 1151 (1969). Moreover, in at least two of the above-cited cases from this Circuit, the evidence on the Government's direct case was in fact reviewed and found to be sufficient (United States v. Rosengarten, supra; United States v. Brown, supra), and in the third the Government's evidence was quite obviously sufficient (United States v. Borrone-Iglar, supra). Since this Court has itself recognized that "[t]he better practice of course is for the trial judge to rule promptly upon such motion so that the defendant may decide whether or not to proceed with the introduction of evidence in his defense" (United States v. Brown, supra, 456 F.2d at 94), we urge that the "waiver" rule in this Circuit be modified and the Government's direct case here reviewed for sufficiency for the reasons set forth by Judge Bazelon in Cephus v. United States, supra. Indeed, it is particularly important in this case that the Government's evidence alone be reviewed for sufficiency in view of the unavoidable difficulty that the District Court, sitting without a jury, would have in separating its function as a judge of determining the sufficiency of the evidence at the end of the trial from its factfinding function in lieu of a jury. Cf. Cephus v. United States, supra.

concerning whether he told Whellan that he "should give money or gifts to officials of any union." Three of appellant's answers were unresponsive to the questions asked or there was no answer at all.* The thrust of five of appellant's six remaining answers was that he did not remember ever telling Whellan that he should give money or Christmas gifts to

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*(Numbers refer to the order in which the questions appear in Count II of the indictment):

> 1. Q. Did you ever tell Whelan that he should give money or gifts to officials of any union?
>
> A. I knew Whelan real well and I told him -- I said you got a very able lawyer. Go to your lawyer. You come to me a lot of times.
>
> I can't do anything for myself, how am I going to do anything for you.
>
> I went out of business on that condition.
>
> 2. Q. Mr. Meyers, my question was did you ever tell Whelan?
>
> A. To give money?
>
> * * *
>
> 8. Q. Well, did you ever have any conversation with Mr. Whelan about whether he should give money or gifts of any kind to any union officials, Mr. Meyers?
>
> A. I don't think he ever asked me that type of question.
>
> He used to come to me.
>
> He had trouble with cutting and he came to me and I said go see your lawyer.
>
> I said you got a very capable lawyer.

union officials.* Thus, Count II of the indictment can only be read as charging appellant with falsely swearing that he

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* 3. Q. That he should give money or Christmas gifts to union officials rather.

A. I would say to the best of my memory, I would say no.

4. Q. Do you understand what I am asking you, I am asking you in substance did you ever tell Mr. Whelan that he should pay off any union officials?

A. I understand your question. I would say offhand, I would say no.

5. Q. I am not asking you to be offhanded about it.

A. I couldn't remember specifically, because I couldn't tell him who to pay, because I don't know, no union officials to pay in the Cutters' Union. I answered that question before.

6. Q. You would remember, would you not, whether you told Mr. Whelan or advised Mr. Whelan to give gifts or presents to union officials, you would remember if you told him that, wouldn't you?

A. I would say yes, I would remember that. I don't remember. I would say 99 per cent that I would remember that I never told him to give -- I told him to see his lawyers.

He used to run to me for favors. He used to keep calling me.

I said what can I do?

7. Q. You were saying you are 99 per cent sure you never told Whelan he should ever give any kind of gifts or Christmas gifts to union officials, is that correct?

A. I would even go further and say

did not remember such a conversation when in fact he did.

The statute under which appellant was indicted requires the Government to prove beyond a reasonable doubt that he "knowingly" gave false material testimony under oath before the grand jury. 18 U.S.C. §1623(a) and (e). Thus, "[t]he accused's knowledge of the falsity of his statements at the time he made those statements [was] essential to a perjury conviction under 18 U.S.C. §16[23]." United States v. Sweig, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971).* In the context of appellant's failure to remember the "Christmas gift" portion of his February 28 conversation with Whellan, it was of course incumbent upon the prosecution to prove

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(Footnote continued from the preceding page)

> even 100. To the best of my memory is concerned. I said you are a big boy, do anything you want.
>
> Emphasis added.

The ninth and last question and answer,

> 9. Q. Is the answer to my question no, you never had any?
>
> A. I would have to say no,

although a more categorical denial, does not change the theory of appellant's alleged perjury under Count II, that of knowingly giving false testimony as to memory. This is demonstrated by the fact that the prosecutor did not even mention the last question and answer in his opening remarks as to Count II (21-22).

*While the perjury statute involved in Sweig was 18 U.S.C. §1621, "[t]he substantive elements of perjury are the same under either statute [§1621 and §1623]." United States v. Kahn, 472 F.2d 272, 283 (2d Cir. 1972), cert. denied, 411 U.S. 982 (1973).

that appellant did remember that portion of the conversation at the time of his grand jury appearance. However, "[i]n view of the requirement that proof of the appellant's recollection of the incident which he denied recollecting must establish the fact of his guilt beyond a reasonable doubt, something more is necessary to convict than proof that the [conversation], not remembered, did in fact occur." Fotie v. United States, 137 F.2d 831, 842 (8th Cir. 1943); cf., United States v. Clizer, 464 F.2d 121, 125 (9th Cir.), cert. denied, 409 U.S. 1086 (1972). People v. Samuels, 284 N.Y. 410, 417 (1940).

Yet all the Government proved here was the objective fact that appellant had told Whellan on February 28, 1974, that "he should give money or Christmas gifts to ... union officials."* There was no evidence presented by the Govern-

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*Indeed, even if appellant had categorically denied, rather than simply not remembering, that he had ever told Whellan that he "should" give "Christmas gifts" to union officials, there is some question whether that would have been a perjury or the literal truth for which appellant could not have been convicted. Bronston v. United States, 409 U.S. 352 (1973). The transcript of the tape recording of the February 28 conversation, rather than Whellan's paraphrasing of that conversation at trial, reflects that appellant actually said:

> ... Incidentally, I am going to say this in front of Jack, you can do anything you want; people don't make a living from the union, you give the union a Christmas gift every once and a while."
>
> Emphasis added.

If the meaning of "should" is taken to be "the past tense

ment that appellant remembered making that statement. To the contrary, the Government's proof was entirely consistent with the honest failure of a seventy-four year old man to remember such a remark while testifying before the grand jury. The "Christmas gift" comment was made by appellant more than seven months prior to his appearance before the grand jury, with the unavoidable clouding of memory that such a hiatus would cause as to even more significant conversations. The "Christmas gift" remark, however, was hardly a significant conversation; rather, it was by its terms an incidental comment ("incidentally, I am going to say this in front of Jack, you c an do anything you want" (emphasis added)), which came at the end of a conversation devoted to Whellan's "cutting" problem. Moreover, the conversation with Whellan on February 28 was far from the only one appellant had with the informant. Whellan himself admitted that he constantly went to appellant for advice

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of shall" (Webster, NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (College edition at 1349), in the sense that appellant was ordering Whellan to give such a gift or that Whellan was "obliged" to do so, then appellant's caveat, "you can do anything you want," might well remove the foregoing statement from the meaning of "should" as used by the prosecutor or as understood by appellant. Thus, appellant's answer that he never told Whellan that he "should" give a gift or money to union officials, or his failure to remember ever saying that, may well have been the literal truth and an absolute defense to a perjury charge based on his answer to the question.

during the life of the Whellan Coat Company, seeing appellant as much as twice a week since May of 1973. Thus, it would hardly be surprising that appellant, even if he were younger and more rested than he actually was in the grand jury, would fail to remember a chance remark he had made more than seven months previously during the course of just one of numerous conversations with Whellan. When it is remembered, however, that the grand jury minutes introduced by the Government demonstrate as well that appellant complained of "an abscess on my tooth and I didn't sleep all night [and] I have a very dull pain," not to mention the strain and tension appellant was unavoidably under while testifying, appellant's forgetfulness was only to be expected. If the fifty-three year old Harold Whellan, despite his "very good memory" due to his "intelligence" and "education," could not accurately remember how many times he surreptitiously tape recorded conversations with appellant -- he remembered only as many as six, while Agent Guio confirmed that there were nine -- even though appellant was a target of Whellan's investigation, seventy-four year old Max Meyers could surely have truthfully failed to remember his "Christmas gift" remark while testifying before the grand jury.

Significantly, since the Government had the tape recording of that conversation and the transcripts prepared from it, they had an easy method of at least attempting to

to jog appellant's memory in the grand jury, if it is assumed that the Government actually was interested in obtaining appellant's information rather than "to get him for perjury." Brown v. United States, 245 F.2d 549, 555 (8th Cir. 1957). While there may have been no "obligation on the part of the United States Attorney to advise the [appellant] of evidence which the former had in his possession or of which he was aware" before asking appellant questions in the grand jury (United States v. Dowdy, 479 F.2d 213, 230 (4th Cir.), cert. denied, 414 U.S. 823 (1973)), had the prosecutor made an attempt here to refresh appellant's recollection by playing the tape or showing him the transcript, the Government could more easily argue that it had exhausted all the means at its disposal of proving appellant's knowingly false lack of memory.* Compare the Government's effort to refresh the recollection of a witness in Fotie v. United States, supra, 137 F.2d at 842. The Government's inexplicable failure in this case to at least make the effort makes the failure of proof all the more inexcusable.

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*Even if the prosecutor had done so, however, and appellant's recollection of the February 28 conversation remained unrefreshed, the Government's proof of appellant's false failure of memory, without more, would still have been insufficient, raising "an assumption [of recollection] and nothing more." Fotie v. United States, supra, 137 F.2d at 843.

While it is true that "a defendant's knowledge of the falsity of his statements can be proved ... through circumstantial evidence" (United States v. Sweig, supra, 441 F.2d at 117; American Communications Ass'n. v. Douds, 339 U.S. 382, 411 (1950)), the circumstantial evidence must be "strong and convincing" (United States v. Magin, 280 F.2d 74, 78 (7th Cir.), cert. denied, 364 U.S. 914 (1960)), and must be of "a quality to assure that a guilty verdict is solidly founded" (United States v. Collins, 272 F.2d 650, 652 (2d Cir. 1959)). Here there was no such evidence. Important to any circumstancial evidence case is "proof of a motive to lie" (United States v. Sweig, supra, 441 F.2d at 117; Brown v. United States, supra, 245 F.2d at 555). Yet here there was no evidence that appellant had any motive for not remembering the February 28 remark concerning a "Christmas gift." The Government offered not a shred of evidence to suggest that appellant had a failure of memory in the grand jury to protect someone else, or out of fear, or to gain any personal advantage. Indeed, appellant's grant of immunity seemingly negated any suggestion that he had a motive to lie, and appellant confirmed this on his own case by insisting that had he remembered the conversations he was asked about, he would have testified to them since he "had immunity ... they give you immunity they can't prosecute."

In short, the Government did not sufficiently establish appellant's guilt of "knowingly" giving false testimony.

Thus, appellant's motion for a judgment of acquittal at the close of the Government's case should have been granted.

Appellant did not supply any substantive evidence upon which a finding of guilt beyond a reasonable doubt could be based. Rather, his testimony at trial that he had simply not remembered the February 28 conversation was consistent with his failure to remember before the grand jury. Nevertheless, the District Court convicted appellant because it found his "trial testimony to be inherently incredible and not worthy of belief." A disbelief in appellant's testimony, however, cannot make up for a party's failure to meet its burden of proof, in this case proof of knowledge beyond a reasonable doubt. Wessel v. Buhler, 437 F.2d 279, 283 (9th Cir. 1971); Federal Insurance Co. v. Summers, 403 F.2d 971, 974 (1st Cir. 1968); Mandelbaum v. United States, 251 F.2d 748, 752 (2d Cir. 1958); Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).*

> ... [T]his court has also said that in determining whether or not a directed verdict is justified, "*** the evidence must be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him which may be fairly drawn." Cross v. M.C. Carlisle & Co., [368 F.2d 947 (1st Cir. 1966)] ... at

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*It is significant to note that while Dyer is often cited for the proposition that a witness who is disbelieved may cause a belief the opposite of his testimony, Judge Hand stated that such a result exists in "strict theory" and a "verdict would nevertheless have to be directed against" the party placing reliance on such evidence.

> 953. But this does not mean that the party having the burden of proof has a right to get to the jury when the only evidence is testimony against him. Dyer v. MacDougall, [supra, 201 F.2d 265]; Davis v. National Mortgatee Co., 349 F.2d 175 (2d Cir. 1965); Mandelbaum v. United States, [supra, 251 F.2d 748)]. Moreover, in Janigan v. Taylor, 344 F.2d 781,(1st Cir. 1965), cert. denied, 382 U.S. 879, 86 S.Ct. 163, 15 L.Ed.2d 120, this court held that:
>
> > "***however satisfied a court may be from the witness's demeanor or his demonstrated untruthfulness in other respects that certain testimony is false, it cannot use such disbelief alone to support a finding that the opposite was the fact." 344 F.2d at 784.
>
> If a court as the trier of fact may not use disbelief alone to find that the opposite was fact, a fortiori a party is not entitled to get to the jury on the sole basis that the jury may disbelieve the testimony of his adversary.
>
> Federal Insurance Co. v. Summers, supra, 403 F.2d at 974.

The question here is not whether the court, sitting as a jury, could have assessed appellant's credibility, found it wanting, and returned a guilty verdict. Rather, the question is whether there was sufficient evidence to permit the court qua court to deny appellant's motion for a judgment of acquittal at the close of the entire case so that it might then consider the evidence as a factfinder, proceeding thereafter to render a verdict.

Appellant contends that under the proof offered in support of Count II, "the fact of appellant's recollection [of

the February 28 conversation] remains an assumption and nothing more" (Fotie v. United States, supra, 137 F.2d at 843). Regardless of the District Court's finding on the question of appellant's credibility, it "represents too slender a reed upon which to rest [a perjury] conviction." United States v. Clizer, supra, 464 F.2d at 125; cf. United States v. Esposito, 358 F.Supp. 1032 (N.D.Ill. 1973), cert. denied, 414 U.S. 1135 (1974); People v. Samuels, supra; People v. Lambardozzi, 35 A.D.2d 528 (2d Dept. 1970), affirmed, 30 N.Y.2d 677 (1972).

Consequently, the Government failed to prove beyond a reasonable doubt appellant's guilt of perjury under Count II,* requiring the dismissal of that count. Cf. United States v. Johnson, 513 F.2d 819 (2d Cir. 1975).

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*Since the District Court made no specific findings of fact as to each count of the indictment, it can only be assumed that its general findings applied to Count II as well as to Count I.

B. Count One

Under Count I, appellant was indicted for perjury based on his answers to fourteen questions.* Appellant's answers to four of those questions were obviously truthful.** While

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*Two references to questions ("Q") under Count I of the indictment are not actually questions:

> Q. Did you --
>
> A. I think Mr. Evola was the truckman.
>
> * * *
>
> Q. You have lost me.
>
> A. Well, I will try to find you again, sir.

**(Numerals refer to the order in which the questions appear in Count I):

> 5. Q. -- have you ever heard of the phrase or term that a manufacturer or a trucker are registered, that is a certain trucker is registered to a certain manufacturer or a certain manufacturer is registered to a certain trucker? Forget about unions and forget about contractors.
>
> A. Sir, I answered you that. I heard that phrase a million and one times. Where I hear it, I wouldn't know. I said yes.
>
> 6. Q. What does it mean in that context?
>
> A. Like you said, I say it could mean marriage. It could mean anything.
>
> 7. Q. I am not asking what it could mean. I am not asking what I said. I am asking what you have understood it to mean on a million and one occasions on which you have heard it.
>
> A. That you got to use that trucker,

appellant's answers to the first six of the remaining ten questions were categorical denials of the fact of ever conversing with Whellan or anyone else about the "trucking problem" he actually discussed with Whellan on October 4, 1973,* his answers to the remaining four questions were not

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I said that to you, sir.

8. Q. That you got to use that trucker?

A. That is right. I heard that phrase a zillion and one times in my life.

* 1. Q. Did you ever have any conversation with this man Whelan about what truckers he should use?

A. No, sir.

2. Q. Did you ever tell him that he had to use or should use one particular trucker, that he was supposed to use one trucker and not use any other trucker?

A. No, sir.

* * *

3. Q. Did you ever have any conversations with Mr. Whelan on the subject of whether he should use Trinity Trucking as a trucker?

A. No, sir.

* * *

4. Q. Well, did you ever have any conversations with Mr. Whelan in which you told him that he had to use or should use Mr. Evola's company for all his trucking?

A. No, sir.

* * *

9. Q. Have you ever used the phrase itself

denials of the fact of such a conversation, but rather denials of memory of such a conversation.* Indeed, his answer

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in the sense that a certain manufacturer had to use a certain trucker?

A. You mean did I ever suggest it to anybody? No, sir, I did not.

10. Q. You are sure about that?

A. Definitely not. I will swear to that over and over and over and over. Never did. Never told any manufacturer to use or what to use. Never solicited.

* 11. Q. You never told any manufacturer that he was registered to a certain trucker or a certain trucker was registered to him in a sense of having to use that certain trucker in a sense that you just described?

A. I wouldn't remember that, sir. I don't keep conditions down. You asked the question. Whether I can remember, all I would say to you the phrases are around. The condition I know. Whether I told anybody -- I don't remember that, sir. I am not in the trucking business, sir.

* * *

12. Q. I thought you just got through telling me, Mr. Meyers, that you had never told anybody that you had to use or should use a certain trucker or didn't you just tell us that a few minutes ago.

A. I said I don't remember of anybody ever asking me that, and I said I will use a trucker. I haven't changed truckmen for 25 years.

I used Trinity Trucking because my brother was an owner at one time of the condition down at Trinity Trucking.

13. Q. I am sorry? Didn't you tell us a

to the first of these last four questions indicates appellant's misunderstanding of what the prosecutor had previously asked him, for he stated in that answer, "You asked the question. Whether I can remember ... ," although the prosecutor had not previously asked if appellant "remembered." Moreover, the prosecutor's last question on the matter under Count I, and appellant's last answer, are directed at appellant's memory, rather than to the objective fact, of such a conversation:

> Q. You are saying to the best of your memory you have never told anybody that they ought to use or should use a certain trucker, is that right?
>
> A. Yes.

Thus, the context that the prosecutor has sought to provide under Count I of the indictment demonstrates that the gravamen of that count is not that appellant perjuriously denied ever having such a conversation, but rather that he

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> few minutes ago that you had never told anybody that they had to use a certain trucker, is that right?
>
> A. I would say to the best of my memory I never told anybody.
>
> * * *
>
> 14. Q. You are saying to the best of your memory that you have never told anybody that they ought to use or should use a certain trucker, is that right?
>
> A. Yes.

did not remember such a conversation when in fact he did. In reaching this conclusion, it cannot be fairly said, and we are not arguing, that each of appellant's answers under Count I must be perjurious in order to sustain that Count. On the other hand, neither can it be fairly argued that appellant's perjury lay in his answers to the first six questions, and his answers to the last four must be disregarded in assessing the thrust of Count I. To hold so would run afoul of the constitutional concept that an indictment must give a defendant fair notice of what he must defend against. Cole v. Arkansas, 333 U.S. 196-201 (1948). If the Government had sought a perjury indictment against appellant under Count I on the theory that he had falsely denied having the conversation with Whellan, it could easily have secured it either by "pin[ning] the witness down to the specific object of the questioner's inquiry" (Bronston v. United States, supra, 409 U.S. at 360), or by framing the indictment differently. A precisely framed indictment is no less "imperative" than "precise questioning ... as a predicate for the offense of perjury." Id., 409 U.S. at 362. Count I of the indictment which has been returned against appellant can only be read to charge him with falsely denying his memory of the October 4 conversation with Whellan.

For the reasons stated in the foregoing discussion of the insufficiency of the evidence under Count II, which is

even more clearly restricted to the theory that appellant falsely denied his memory of the later conversation, there was similarly insufficient evidence to prove appellant's guilt under Count I beyond a reasonable doubt. All that the Government proved under Count I was that appellant in fact had a conversation with Whellan on October 4, 1973, during which he told the informant that he could not change Amity Trucking Company as his trucker without Amity's permission. The Government failed to offer any evidence that appellant in fact remembered that conversation.

The only point of distinction between the quantum of evidence introduced under Counts I and II is the fact that appellant's discussion of the "trucking problem" on October 4 was more extended than his "incidental" remark concerning a "Christmas gift" on February 28. Yet any argument that appellant was more likely to remember the October 4 conversation because of its greater length is completely undermined by the fact that it took place not just eight months prior to appellant's grand jury appearance, but rather a full year before. Moreover, Whellan himself conceded that appellant was "concerned" over the liquidation of his business when Whellan engaged him in the tape recorded conversation on October 4, 1973. Thus, with his mind on his own business problems during the twenty-minute conversation with Whellan on October 4, appellant was as likely to forget that conversation one week after it occurred as he was a full year

later before the grand jury.

Here, as with Count II, whatever may have been the assumption of the District Court as to appellant's memory of the October 4 conversation, "under the proof offered in support of this count, the fact of appellant's recollection remains an assumption and nothing more." Fotie v. United States, supra, 137 F.2d at 843. Therefore, his guilt of perjury under Count I was not supported by sufficient evidence to convict him of the offense beyond a reasonable doubt. Accordingly, Count I of the indictment must be dismissed.

Point II

PURSUANT TO THIS COURT'S SUPERVISORY JURISDICTION, "SEALING" REQUIREMENTS SHOULD BE APPLIED TO CONSENSUAL INTERCEPTION OF COMMUNICATIONS IN ORDER TO PROTECT THE INTEGRITY OF EVIDENCE ADMITTED IN FEDERAL CRIMINAL TRIALS.

In enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 18 U.S.C. §2510 et seq., Congress sought to mitigate the dangers inherent in permitting the Government to engage in electronic monitoring of private communications by creating an elaborate framework of court supervision and control. 18 U.S.C. §2518. As an integral part of that framework, Congress required that recordings made of such intercepted communications be sealed and stored under court direction. 18 U.S.C. §2518(8)(a). While intercepted communications where one party consents to the interception have apparently been exempted from these provisions, nevertheless the need to ensure that recordings made from such interceptions are not altered or edited remains at least as great as in the case of interceptions covered by the Act. Thus, there is adequate reason for requiring comparable sealing standards as provided in the Act. Although no statutory or constitutional provision requires the Government to take such precautionary measures, this Court has jurisdiction under its supervisory powers to require such a procedure for the protection of the integrity

of evidence introduced at trials in Federal courts.

Tape recordings made from electronically intercepted communications, because of the ease with which they can be altered or edited and the extreme difficulty of detecting such alterations, indisputably lend themselves to "diabolical fakery" (Lopez v. United States, 373 U.S. 427, 468 (1963) (Brennan, J., dissenting); see also Dash, Schwartz, and Knowlton, THE EAVESDROPPERS, at 368 (1959); cf. People v. Nicoletti, 34 N.Y.2d 249 (1974)). As a result, Congress has provided in Title III of the Act that

> [t]he contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.
>
> 18 U.S.C. §2518(8)(a). Emphasis added.

The primary purpose of the "sealing" provision in the statute is "to maintain the integrity of the tapes for evidentiary purposes" (United States v. Falcone, 505 F.2d 478, 483-484 (3d Cir. 1974), cert. denied, 95 S.Ct. 1339 (1975); 1968 U.S. Code Cong. & Admin. News at 2193-2194), as well as "protecting the confidentiality of the tapes and ... establishing a chain of custody at trial" (United States v. Kohne, 358 F.Supp. 1053 (W.D.Pa. 1973), affirmed, 485 F.2d 682 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974)). Thus, although a delay in sealing such tapes under court supervision, absent a showing of tampering, may not require their suppression at trial (United States v. Falcone, supra; United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972)), "this holding, of course, does not deprecate the importance of the sealing requirement. Certainly, it should be complied with in all respects." United States v. Falcone, supra, 505 F.2d at . Moreover, where there is a total absence of a court-supervised seal, without a satisfactory explanation, use of the tapes is precluded at trial. Cf. People v. Nicoletti, supra.

The danger of improper editing or altering of tape recprdings of communications intercepted pursuant to court order which impelled Congress to enact rigid sealing requirements is as great, or greater, where the Government proceeds without any court authorization or supervision at all. At least in the case of court sanctioned interceptions, an agent

or informant of the Government otherwise disposed to tamper with tape recordings could not be unmindful that the tapes were acquired under court authority and were ultimately subject to judicial scrutiny in advance of trial. In that case, the court's immediate and direct interest in the fruits of intercepted communications would presumably provide some deterrent effect to any improper alteration of such tapes. In the case of non-court sanctioned, consensual interceptions, however, Government agents and their informers are subject to no outside supervision, and need not disclose the contents of the tapes until trial. These circumstances unavoidably provide greater opportunity and freedom to edit or alter the tapes. Thus, while the need for protection against improper alteration remains at least as great in the consensual as in the non-consensual, court-monitored wiretap or eavesdrop area, there currently exist no protections at all for defendants such as appellant Meyers.

The present case, a perjury prosecution in which appellant's precise words at the prior conversations were of critical importance (Bronston v. United States, 409 U.S. 352 (1973)), demonstrates at least the potential for abuse, intentional or inadvertent, where no immediate sealing requirement exists. The two pertinent tapes were made on October 4, 1973, and February 28, 1974. The October 4 tape was not received by Agent Guio until October 9, five days later, when it was handed to him by Sergeant Panza, an undercover

officer with the New York City Police Department who was working on the investigation.* There is no indication in the record, however, as to who had acess to that tape before it was turned over to FBI custody. Moreover, once the FBI had custody of the tapes, they were not turned over to the U.S. Attorney's office or to the Strike Force attorney, but rather were kept in the FBI office in New York City. Here, too, there is no indication as to how the tapes were stored, which agents had access to them, and what was done to protect their authenticity.** Finally, while the tapes were duplicated under the "authority" of Agent Guio, whatever that might mean, there nevertheless existed "the possibility for human or mechanical error, erasure of portions of the tapes and the destruction of evidence" inherent in

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*There is no similar reference in the record as to when Agent Guio came into custody of the February 28 tape, except in the stipulation that "agents of the FBI took these tapes as a result of the surveillance they conducted and that they kept them in their custody until it was produced here in court."

**Counsel's willingness "to accept the United Staees Attorney's word" that the tapes introduced into evidence, Government Exhibits #1 and #4, were the originals of the duplicates played for him just prior to the commencement of trial, does not answer the question or resolve the issue of whether the originals themselves were altered or edited.

the duplicating process. People v. Nicoletti, supra, 34 N.Y.2d at .*

In short, while appellant made no claim at trial that the orginal tapes had in fact been altered, it was the ample opportunity and potential for such abuse, in the absence of a sealing requirement similar to one contained in §2518(8)(a) which presents the problem. Indeed, in cases such as this one, where a defendant cannot remember the conversation which was recorded and therefore cannot dispute its authenticity for that reason, there is no way other than a sealing requirement to ensure factfinding of the recording's accuracy.

In order to protect the integrity and authenticity of such tape recordings admitted in evidence at criminal trials in district courts within this Circuit, this Court can fashion a sealing requirement rule under its supervisory jurisdiction. McNabb v. United States, 318 U.S. 332, 340-341 (1942); Mesarosh v. United States, 352 U.S. 1, 14 (1956); United States v. Dowdy, 479 F.2d 213, 229 (4th Cir. 1973). As has already been shown, the need for such a rule is cer-

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*Indeed, there was a complete absence of any testimony concerning the operation of the recording device, the method used to operate it, and the mechanics of the duplication process producing the tapes which the informant, Whellan, heard more than one year after the conversations and which he claimed were accurate renditions of the original conversations. Cf. Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956).

tainly no less in a case where, as here, the tapes were the fruit of communications intercepted without court supervision, than in cases of court-monitored interceptions in which §2518(8)(a) requires a sealing procedure. Such a rule would not be dissimilar from the more general, judicially created rule requiring the Government to establish chain of custody for the admission of physical evidence at trial. United States v. Campopiano, 446 F.2d 869 (2d Cir. 1971), vacated on other grounds, 408 U.S. 915 (1972); United States v. S.B. Penick & Co., 136 F.2d 413 (2d Cir. 1943). Rather, a specific sealing requirement in cases such as this one would meet the unique evidentiary problem presented by tape recordings and the ease with which they can be undetectably altered. Finally, a sealing requirement here would at least be a start toward assuaging the concern over unsupervised, consensual electronic surveillance by the Government, expressed particularly by the four Justices who took issue with the pluarlity decision in United States v. White, 401 U.S. 245 (1971), holding that such seizures were not protected by the Fourth Amendment.* See also Greenawalt,

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*While Justice Brennan actually concurred with the judgment of the plurality in White, he did so on the basis of the non-retroactivity of Katz v. United States, 389 U.S. 347 (1967), as held in Desist v. United States, 394 U.S. 244 (1969), at the same time making it clear that he agreed with Justices Douglas, Harlan, and Marshall, who dissented on the pluarlity's substantive holding that the Fourth Amendment does not protect against consensual eavesdropping or wiretapping.

The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation, 68 Colum.L.Rev. 189 (1968).

Nor would a rule requiring a judicially-supervised seal on such tape recordings place an undue burden on the Government or the courts. It would not, for instance, affect whatever governmental procedure currently exists for storing such tapes since even in enacting the storing provisions of §2518(8)(a) Congress envisioned that "[m]ost law enforcement agency's [sic] facilities for safekeeping will be superior to the court's and the agency normally should be ordered to retain custody [of the tapes]." 1968 U.S. Code & Admin. News at 2193. Thus, the Government could continue to maintain custody of the tapes, as it did in this case, without requiring the court to oversee their storage. Instead, the Government would simply be required to have such tapes sealed, immediately upon their acquisition, under the supervision of someone who is a part of the judicial branch, whether that person be a judge, a magistrate, or even a clerk of the court. Whatever minimal inconvenience might be occasioned by this procedure is a small price to pay for reducing the risk of improper editing or altering of tapes, which Congress has implicitly recognized exists in the area of court-warranted interceptions.

Even if this Court is unwilling to order court-supervised sealing, however, the Government should at least be

required to establish a formal procedure for sealing tape recordings to protect their integrity, overseen by someone in the agency who has not been connected with the investigation resulting in the gathering of the tapes. In analogous situations, state welfare agencies have been required to establish an independent body or person to review the propriety of terminating welfare grants (Goldberg v. Kelley, 397 U.S. 254, 271 (1970)); state prison systems have been required to establish an independent body to review charges of prison rules infractions (United States ex rel. Miller v. Twomey, 479 F.2d 701, 716 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1974); and state parole departments have been required to establsih a procedure for an independent person to review initially charges of probation violations (Morrissey v. Brewer, 408 U.S. 471 (1972)). A similar procedure should be required here. Indeed, the American Bar Association has recommended that the administrative procedures similar to those provided for by Congress in §2518(9)(a) should be established with regard to consensual interception of communications, and should be followed "under the supervision of the principal prosecuting attorney." ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO ELECTRONIC SURVEILLANCE, §§4.2, 5.13, 5.14, 5.18 (Approved Draft 1972).

Since there was no seal on the tapes introduced at appellant's trial, nor any indication of any similar procedure

being followed administratively to guarantee the integrity of the tapes from improper editing or alteration, appellant's conviction should be reversed and a new trial ordered.

Point III

THE RETURN OF APPELLANT'S PERJURY INDICTMENT BY THE SAME GRAND JURORS BEFORE WHOM HE ALLEGEDLY LIED WAS A DENIAL OF DUE PROCESS.

A putative criminal defendant is entitled to have the charges against him considered by a grand jury which is impartial. Where, however, the offense the grand jurors consider is perjury committed before them, the grand jurors to whom and before whom the witness has allegedly lied cannot help being infected by a special animus against him derived from their combined statuses as witnesses to the offense and as aggrieved parties. The unavoidable effect of this animus is to compromise the impartiality of the entire body. Thus, fundamental fairness, or at least the appearance of fairness, requires that, in the unique case of perjury before a grand jury, a defendant has the right to have a different panel consider that charge. The failure of the Government to follow this procedure here, despite the ease which which such a procedure could have been accomplished, requires that appellant's motion to dismiss the indictment be granted.

The Fifth Amendment requires that the Government proceed against a criminal defendant by indictment of a grand jury. To be sure, then, one important function of a grand jury is "to examine into the commission of crimes," Hale v.

Henkel, 201 U.S. 43, 59 (1906). In this capacity, grand juries are invested with "broad investigative powers to determine whether a crime has been committed and who has committed it." United States v. Dionisio, 410 U.S. 1, 15 (1973).

> No judge presides to monitor [a grand jury's] proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.
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> United States v. Calandra, 414 U.S. 338, 343 (1974).

Indeed, so broad are the investigative powers of the grand jury that it remains unfettered by the Fourth Amendment's exclusionary rule, and may even consider evidence which has been unconstitutionally seized. Id., 414 U.S. at 343.

However, a grand jury serves another equally important historical function: that of "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." United States v. Dionisio, supra, 410 U.S. at 17; see also Hale v. Henkel, supra; Ex Parte Bain, 121 U.S. 1, 12 (1887). In this capacity, the Fifth Amendment "presupposes" that the grand jury will act "independently of either prosecuting attorney or judge ... to clear the innocent, no less than to bring to trial those who may be guilty." United States v. Dionisio, supra, 410 U.S. at 16-17.

In view of the grand jury's awesome investigative powers, its equally significant "protective" role would nevertheless be rendered meaningless and overborn if the grand jury as a whole was not a fair and impartial body. Accordingly, using a variety of formulations, a number of courts have found, expressly or impliedly, that the Constitution requires the grand jury to be a fair, nonbiased tribunal. One court has characterized the grand jury as "that impartial tribunal which the Constitution has established" (United States v. Wells, 163 Fed. 313, 327 (D.Idaho 1908) (emphasis added)), and another court has recently held that due process "requires that an indictment be returned against a defendant by an unprejudiced grand jury" (United States v. Whitted, 325 F.Supp. 520, 522-523 (D.Neb. 1971), reversed on other grounds, 454 F.2d 642 (8th Cir. 1972) (emphasis added)).* The Supreme Court itself has apparently assumed that the Constitution requires the grand jury to be an impartial body, for in Cassell v. Texas, 339 U.S. 282 (1950), it formulated the issue in the case this way: "Review was sought in this case to determine whether there had been a violation by

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*In Whitted, the Eighth Circuit reversed the District Court's dismissal of the indictment on the ground that Fed. R.Crim.P. 12(b) prohibits the dismissal of a defective indictment after the trial jury has returned with a guilty verdict, at least in a situation where, as here, the trial judge had denied the motion on the same facts at the beginning of trial. The Circuit, however, expressed no disapproval of the trial judge's holding that due process requires the return of an indictment by an "unprejudiced" grand jury.

Texas of petitioner's federal constitutional right to a fair and impartial grand jury" (emphasis added). Moreover, in Costello v. United States, 350 U.S. 359, 363 (1956), the Court stated that the Fifth Amendment's requirements were satisfied by "an indictment returned by a legally constituted nonbiased grand jury" (emphasis added). Accord, Lawn v. United States, 355 U.S. 339, 349 (1958); United States v. Stein, 140 F.Supp. 761, 767 (S.D.N.Y. 1956). Finally, relying on Cassell, Judges Bazelon and Edgerton expressly recognized the existence of a "federal constitutional right to a fair and impartial grand jury" in Quinn v. United States, 203 F.2d 20, 26 (D.C. Cir. 1952)(Bazelon, J., concurring); but see Gorin v. United States, 313 F.2d 641, 645 (1st Cir. 1963), cert. denied, 379 U.S. 971 (1965). Thus, reason and authority support the conclusion that putative criminal defendants in Federal courts should be entitled under the Constitution to have indictments against them returned by an unbiased grand jury.*

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*The validity of the proposition that a defendant is entitled to be indicted by a grand jury which, as a body, is fair and impartial remains unaffected by those cases in which, although one or several grand jurors were shown or thought to be biased, there were at least twelve grand jurors who were unaffected. Fed.R.Crim.P. 6(b)(2); e.g., Castle v. United States, 238 F.2d 131 (8th Cir. 1956); May v. United States, 175 F.2d 994 (D.C. Cir.), cert. denied, 338 U.S. 830 (1949); United States v. Anzelmo, 319 F.Supp. 1106, 1113 (E.D.La. 1970). While an indictment may be valid where only some of the grand jurors are biased, "[t]his is not equivalent to saying that if all the members of the jury were partial or biased no attack would lie." Orfield, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, §6.70 at 436 (1966); cf. Pierre v. Louisiana, 306 U.S. 354 (1939).

Appellant, however, was not afforded his right to an unbiased and fair grand jury. One can scarcely imagine a stronger impetus towards bias than to have the grand jurors who are to decide whether to indict a defendant for an offense not only witness that offense but, in a real sense, unavoidably feel themselves victimized by it as well.

The instant case presents that situation. If appellant committed perjury, the crime was completed in the presence of the grand jurors when appellant knowingly gave false answers. Thus, the grand jurors were witnesses to the offense and, in fact, the stiuplated testimony of the grand jury deputy forelady, Anna Haden, to the effect that the indictment contained appellant's grand jury testimony, was introduced against appellant at trial. Moreover, it would be only natural for the grand jurors to take special umbrage upon learning that appellant had probably lied to them. The affront they could naturally have felt might well have resulted in clouding their critical judgment, causing them to forego their right to call additional witnesses or ask additional questions in order to determine whether a perjury charge was well founded. In short, the grand jurors' combined statuses as witness to the perjury as well as parties who felt themselves aggrieved by it would serve to compromise their impartiality and prejudice them against appellant. Their bias is inherent in their multiple roles.

In Goldberg v. United States, 472 F.2d 513 (2d Cir. 1973),

while concluding that no statutory or constitutional bar existed "to prevent the United States Attorney from compelling a potential defendant in a related proceeding who has been granted immunity under 18 U.S.C. §§6002 and 6003 to testify before a grand jury which is not being asked to indict him," this Court cautioned:

> We would be greatly troubled by what happened here if the Government were seeking an indictment of Goldberg from the grand jury before which he is being asked to testify. Although the order to compel testimony might be valid, we would have most serious doubt about the validity of such indictment. Despite any instructions from the judge, it would be well nigh impossible for the grand jurors to put Goldberg's answers out of their minds [citation omitted], and testimony compelled by the order would thus 'be used against the witness in [a] criminal case'.... But the Government represented to us in open court that the grand jury before which Goldberg has been directed to answer questions will not be asked to indict him.
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> Id., 472 F.2d at 516. Emphasis added.

Just as grand jurors, "despite any instructions of the judge," cannot be counted on to disregard immunized testimony in deciding whether to indict the witness, neither can they be expected to deliberate impartially on a perjury indictment of someone who has purportedly lied to them. In both cases, the prejudice can be assumed, as it has in other cases of abuse of proper grand jury procedures. Ballard v. United States, 329 U.S. 187, 195 (1946); United States v. Bowdach, 324 F.Supp. 123 (S.D.Fla. 1971); United States v. Silverman,

129 F.Supp. 496, 511 (D.Conn. 1955).

Requiring a fresh grand jury to consider whether a witness had likely perjured himself before a previous grand jury would not be different from those situations in which a second judge is required to hear a charge of criminal contempt committed before another judge. Taylor v. Hayes, 418 U.S. 488, 501-503 (1974); Mayberry v. Pennsylvania, 400 U.S. 455, 463-466 (1971); Offutt v. United States, 348 U.S. 11 (1954); In re Dellinger, 461 F.2d 389, 392-397 (7th Cir. 1972). While no doubt the clearest case for requiring a second judge to hear a contempt charge exists when the first judge becomes "personally embroiled" with the contemnor (Offutt v. United States, supra, 348 U.S. at 17), or becomes "an activist seeking combat" (Mayberry v. Pennsylvania, supra, 400 U.S. at 465), actual bias on the part of the first judge need not always be shown. To the contrary, the Supreme Court has commanded that a second judge must also sit where there was only "such a likelihood of bias or an appearance of bias that the [first] judge was unable to hold the balance between vindicating the interests of the court and interests of the accused." Taylor v. Hayes, supra, 418 U.S. at 501; Ungar v. Sarafite, 376 U.S. 575, 588 (1964).

If disqualifying animus can be presumed on the part of a judge, despite his experience and training in separating his personal feelings from his judicial role, where no actual embroilment ensued, it is easier still to presume a prejudi-

cial animus on the part of lay grand jurors who are deciding the fate of a witness who has lied to them. Thus, while requiring a second grand jury to consider the perjury charge may, as with judges in the contempt area, bar consideration of an indictment by grand jurors "who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties, ... due process of law requires no less." Taylor v. Hayes, supra, 418 U.S. at 501; In re Murchison, 349 U.S. 133, 136 (1955).

In United States v. Camporeale, 515 F.2d 184, 189 (2d Cir. 1975), while reversing the conviction, this Court in dictum said:

> No sound reason is advanced by Camporeale for departing in this case from the settled practice of permitting the same grand jury which heard the witness to file an indictment charging him with perjury. Having had the opportunity to observe his demeanor on the stand, it was in a superior position to determine whether there were reasonable grounds to believe that he was deliberately giving false testimony.[*]

It is respectfully contended that this Court's conclusion that the same grand jury may properly indict for perjury a witness who has given false testimony before it does not constitutionally follow from the premise upon which it is based. It is precisely their "superior position" or in-

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*In Camporeale, this Court did not have the benefit of full briefs on the issue.

timate involvement which should preclude them from making the determination as to whether a witness should be indicted. As has already been shown, their close acquaintance with the case, as witnesses to the offense and as parties who might unavoidably feel themselves aggrieved by the offense, serves to jeopardize the impartiality of the grand jury to which a putative defendant is entitled.

Since "justice must satisfy the appearance of justice" (Offutt v. United States, 348 U.S. at 14), where there exists the possibility of bias on the part of grand jurors who are to determine whether an indictment should be returned, a different panel should make the determination. Since appellant's indictment was not found by a different panel, he is entitled to have it dismissed.

Point IV

THE GRANT OF AUTHORITY TO THE STRIKE FORCE ATTORNEY WHO PRESENTED APPELLANT'S CASE IN THE GRAND JURY WAS IMPERMISSIBLY BROAD, THEREBY REQUIRING THE REVERSAL OF APPELLANT'S CONVICTION AND DISMISSAL OF THE INDICTMENT.

While we recognize that this Court has recently held against an appellant on the issue of the authority of a Special Assistant U.S. Attorney (In re Persico, Doc. No. 75-2031, slip opinion 4129 (2d Cir., June 19, 1975), but see United States v. O'Gorman, 73 Cr. 440 (E.D.N.Y., August 1, 1975) (Watson, J.), this issue is noted for purposes of Supreme Court jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the indictment dismissed.

Respectfully submitted,

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September 3, 1975

Certificate of Service

~~Aug~~ Sept. 3, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Phyllis Kloot Bamberger